not agree. Taxpayer did not execute the waiver. It filed a Protest of the tax within the required period, on August 19, 1947. It advised the Agent by a copy of a letter to the Collector dated August 14, 1947 that it would protest the findings of the revenue agent "within the allotted time." It did so. With this letter it enclosed a check for $225,000 as a part payment of a net tax deficiency it expected to be redetermined as a favorable result of its protest. It also sent back a form of acknowledgment of a copy of the agent's report, headed "Receipt of Revenue Agent's Report," which it signed. (R. Def. Ex. 3) The net deficiency proposed was $316,377.04. The letter of July 23, 1947 stated that if was "not a final notice of deficiency." At no time thereafter did the Agent or the Commissioner ever send taxpayer a "final notice of deficiency" as provided for in Section 272(a)(1). It was assumed that taxpayer, by paying the $225,000, was paying the unprotested part of the proposed deficiency, and this amount was assessed as a tax on October 10, 1947, without notice to taxpayer until April 19, 1948. As a result of a redetermination under its protest, the unprotested part of the proposed deficiency was determined to be $308,493.20. The net deficiency in tax of $316,377.04 was reduced to $249,576.01. The adjusted deficiency was not determined until about April 22, 1948, at which time taxpayer did sign a Section 272(a) waiver of the restrictions on the assessment and collection of an excess profits tax deficiency for 1944 in the effective amount of $308,493.20. Prior thereto, the Collector had transferred from his 9-D, Unclassified Collection Account, on November 14, 1947, the $225,000, as a payment of tax assessed. In pursuance of the waiver of April 22, 1948, the Collector assessed only the balance of $83,493.20 on August 13, 1948.

Final payment of the deficiency in excess profits tax and interest for 1944, was not made until September 2, 1948 as appears from the record. The sum of $83,493.20, together with interest, has been considered by the court below as a payment of tax made within the two-year period for recovery.

With taxpayer's letter of August 14, 1947 there was also enclosed three checks in addition to that for $225,000; one for $33,750 as interest on that sum to August 15, 1947; and, checks for the payment on account of an expected future deficiency in excess profits tax for 1945, in the amount of $150,000 with interest to August 15, 1947, of $13,500. Contrary to the Commissioner's treatment of the deposit of $225,000 for 1944, the advance payments for 1945 were not assessed until a final determination of the excess profits tax on December 10, 1948, when $341,767.06 was assessed. The advance payments were held in the Collector's 9-D account until January 17, 1949, and then transferred as a payment of tax and interest.

REASONS FOR GRANTING THE WRIT

I

The Effect of Walter W. Flora v. United States, No. 492, 357 U.S. 63, Rehearing Granted, June 22, 1959

The court below has held that the sum of $225,000 remitted to the Collector on August 14, 1957, became a payment of tax no later than November 14, 1947 when the Collector applied it to an assessment recorded October 10, 1947. Consequently, the court held that recovery of that amount under the claims for refund filed April 3, 1950, was

barred by Section 322(b)(1) of the 1939 Internal Revenue Code. That section requires the filing of a claim for refund within two years "from the time the tax was paid." In effect, therefore, the court below has held that the term "tax" as used in Section 322(b)(1) includes a partial payment of an asserted tax deficiency. It is submitted that such a position stands in direct opposition to the principles announced by this Court in *Flora* v. *U.S.*, 357 U.S. 63 (1958), rehearing granted June 22, 1959.

In that case, resolving a conflict between the decisions of the Eighth and Tenth Circuits, this Court held that a complaint for refund of income taxes under 28 U.S.C. § 1346 (a)(1) fails to state a claim upon which relief can be granted unless the full amount of the assessed deficiency has been paid. Although the question raised here was not directly involved in *Flora*, the reasoning of the Court in that case is directly in point.

The Court, in *Flora*, stated that the words "tax," "penalty" and "sum" should be given the same meaning in the jurisdictional provision (28 U.S.C. § 1346(a)(1)) as in the "claim-for-refund" statute (1939 Internal Revenue Code Section 3772(a)(1), now § 7422(a) of the 1954 code). This latter statute requires, as a condition precedent to a suit for refund, the filing with the Commissioner of a claim for refund or credit "according to the provisions of law in that regard, and the regulations . . . established in pursuance thereof." Section 322(b)(1) is one of the "provisions of law in that regard," and is an integral part of the general statutory scheme regulating the recovery of overpayments of tax. The word "tax," as used therein, should therefore be given the same meaning as it has in the jurisdictional and "claim-for-refund" provisions, viz: the full tax claimed to be due for the year in question. Such an interpretation

would allow the filing of a claim for refund within two years from the time the tax was paid in full.[1]

Although the conditions precedent to filing a claim for refund with the Commissioner were not directly involved in *Flora*, the Court in its opinion there (Note 10) quoted with approval from *Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205 (1885): "No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid [and] . . . no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law."[2] The relation between the full payment requirement and the time for filing claims for refund has been thus recognized by this Court.

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1. "Section 3772—Suits for Refund

(a) Limitations—

(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

2. It should be noted that in the case at bar, as in most cases in which a partial payment is made, the amount of part payment is not determined by any particular findings of the Revenue Agent, but rather by considerations wholly independent of any questions involving the correctness of the deficiency proposed or assessed. For this reason, it was impossible to file a claim for refund of the partial payment which will conform to the Regulations. Treasury Regulations 11, Sec. 29.322-3 provide: "The claim (for refund) must be set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." In the case at bar, the first date on which it was possible to do this was on April 22, 1948, when, as a result of the protest filed, the preliminary findings of the revenue agent were revised and the deficiency in excess profits tax was finally determined and agreed to.

The result of the Court's holding in *Flora* is to require as a condition precedent to a suit for recovery, the filing with the Commissioner of a claim for refund only after the "full tax" assessed for a given period has been paid. A claim for refund of a partial payment in respect of a tax is unsupportable as a claim.

The "claims for credit or refund" required by Section 322(b)(1) must refer to an effective claim, and it is submitted that the "tax" referred to must be a recoverable "tax," which, under *Flora*, is nothing less than the full tax due. The $225,000 partial payment here was not a recoverable "tax." Therefore, it was not a payment of "tax" on which the statute of limitations began to run until September 2, 1948.

The Court of Claims has made a clearly erroneous interpretation of the Statute, and since the deficiency in excess profits tax for 1944 was not paid in full until September 2, 1948, which is within 2 years of the filing of the claim for refund of April 3, 1950, the full amount of the net overpayment of excess profits tax for 1944 paid as a deficiency is recoverable. The original tax plus the deficiency in tax was the "full tax" for 1944.

The foregoing reasoning is based on the assumption that this Court's original decision of June 16, 1958 in *Flora* correctly states the law and will not be reversed on rehearing. The application of *Flora* is of undoubted general importance in the future administration of the revenue laws.

II

The Decision Below is in Conflict with the "Ninth Circuit Rule" on Validity of Waivers of the Provisions of Section 272 (a) (1) of the 1939 Internal Revenue Code.

Question 5 as herein presented, is now before this Court on petition for a writ of certiorari to the Ninth Circuit Court of Appeals granted in the case of *The United States* v. *Sydelle Price*, No. 809. In that case, certiorari was

granted on the basis of a conflict of authorities and the importance of deciding a question that was estimated to affect taxpayers numbering 900,000 with active delinquent accounts arising under the 1939 Code. Petitioner's position is the same as *Price*. In *Price* the United States brought action to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that she had waived this requirement. It was her position, however, that this requirement may not be waived, and that her purported waiver was therefore ineffective for this purpose. Mrs. Price executed a regular U. S. Treasury Form 870 waiver of the restrictions provided in Section 272(a) of the Code in the amount of $9,965.48 for 1946 on August 18, 1949. On October 14, 1949, the Commissioner assessed against her, for that year, the above sum, plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the Commissioner issued her a 90-day letter asserting deficiencies for penalties in amounts of $2,491.37 and $498.27. No deficiency in income tax was asserted against her in this letter, nor in any other such letter. On January 12, 1950, Mrs. Price paid $1,500 on account for 1946. The remainder of unpaid tax $9,963.57 was the subject of the suit. The purported waiver signed by Mrs. Price recited that it was made pursuant to Sec. 272(d). The Ninth Circuit affirmed a judgment in favor of Mrs. Price. 263 F. 2nd 382. In *Mutual Lumber Co.* v. *Poe*, 9 Cir., 66 Fed. 2nd 904, (1933), it was held that a waiver prior to the mailing of a notice of deficiency is premature and invalid, and that as the notice gave the taxpayer the right of petition to the Tax Court, there was nothing to waive until such a notice had been mailed. The holding in *Mutual* was reaffirmed by the Ninth Circuit in *McCarthy* v. *Commissioner*, 80 Fed. 2nd 618, decided in 1935, and followed

in *East Bay Water Co.* v. *McLaughlin*, D.C.N.D. Cal., 24 Fed. Supp. 222, decided in 1938. The Court of Appeals in *Price* said the basic question common to all three cases was the same—was the waiver valid when filed prior to the mailing of a notice of deficiency? The Court of Appeals again reaffirmed its position that the waiver was invalid.

Accordingly, petitioner in the instant case contends that if it be held that it executed a Sec. 272(d) waiver of the $225,000 prior to assessment, it was entitled nevertheless to receive a final notice of deficiency covering same which would have suspended the assessment and collection of the tax. Such a notice was not sent at any time. As a notice in this case could not have been mailed absent a final determination until sometime about April 22, 1948, the Commissioner was barred from making the assessment of October 10, 1947. A waiver in petitioner's case would be invalid, as the waiver provisions do not come into play until there is a determination by the Commissioner, and none was made in this case until after April 3, 1948 (when the Court below said the statute of limitations for the said two-year period for recovery began to run).

With regard to the conflict of authorities the Government petition in *Price* pointed out "the long-standing administration practice not to send deficiency notices if a waiver had already been filed by the taxpayer, citing *Associated Mutuals* v. *Delaney*, 176 F. 2nd 179, 183 (C.A. 1st). It said *Price* and the other cases in the Ninth Circuit also conflicted with *Moore* v. *Cleveland Ry. Co.*, 108 F. 2nd 656 (C.A. 6th), which is said to be the fountain-head of the view that waivers filed prior to issuance of a notice of deficiency are valid.

It is respectfully submitted that the position taken by the respondent in *Sydelle Price*, in furtherance of the "Ninth Circuit rule" is the better view on the question presented

under Question No. 5 herein, the answer to which is in the affirmative. In support of this statement and as reference material, petitioner here has included in the Apendix, infra, at pages 16-a–24-a, a statement of the Legislative History of Section 272(d), Internal Revenue Code of 1939 as it appears in the brief in opposition to the petition filed in *Price*.

III

The "Waiver". Questions Presented

Question No. 2. The language of the court below in its opinion indicates that the taxpayer, before the October 10, 1947 assessment of $225,000, waived its right to receive a 90-day notice of deficiency based on a determination of tax in that amount, which notice and determination of tax is required by the provisions of Section 272(a)(1) of the 1939 Internal Revenue Code. The court held that such a waiver of notice justified the Commissioner in making the assessment of October 10, 1947. The court did not specifically decide (although the issue was raised by the pleadings) that the taxpayer had, pursuant to Section 272(d), waived the restrictions on the assessment and collection of $225,000 as a tax. To justify such assessment, taxpayer must have signed a specific waiver of the restrictions on the assessment and collection of such amount as a tax, or there is no waiver of any of the restrictions provided by Section 272(a)(1) of that Code. Compliance with the provisions of Section 272(d) must be unequivocal and was essential to validate the assessment of October 10, 1947. Section 272(d) is the only exception to subsection (a)(1) of that section. (See the Legislative History of Section 272 (d), as directly related to Question 5 hereof. Appendix infra, pp. 16-a to 24-a.) Accordingly, the answer to Question 2 is in the negative.

Question No. 3. At the time that taxpayer sent its letter of August 14, 1947 with the remittance of $225,000, and notified the Agent that it would file a Protest against the proposed deficiency by sending him a copy of the remittance letter, and marking the Form of "Receipt for Revenue Agent's Report," there was no way that the amount of "part of the proposed deficiency not protested" could have been determined until after the questions raised in the Protest had been favorably decided for the taxpayer. This involved a process which took one of the questions to the Bureau in Washington to decide. A new question was raised during processing of the Protest. It was not until about April 22, 1948 that the Agent made a determination of the amount of "the part of the proposed deficiency not protested." The determination of the adjusted deficiency of $308,493.20 on the above date proved to be the amount thereof that it did not intend to protest. This was verified by the further fact that on April 22, 1948, taxpayer signed a Section 272(d) waiver. It also verifies the fact that $225,000 deposited with the Collector conditioned on the adjustments to be made was but a part of the sum not protested. The original deficiency proposed was $419,193.64, and the net deficiency was $316,377.04. The latter was reduced to $249,576.01. In face of the Protest, it would have been impossible to make a determination of a definite amount which must be included in a final notice of deficiency. A holding to the contrary would be in direct conflict with *Mutual Lumber Co.* v. *Poe*, supra, in which the Ninth Circuit said, on p. 907:

> ". . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied.)

A final notice of deficiency required by Section 272(a)(1) must define items of adjustment which may form the basis of issues raised in a petition to the Tax Court, and the exact amount of the deficiency in tax arrived at must be asserted. Consequently, in view of these facts and circumstances, how could the lower court legally conclude that taxpayer had waived a notice of deficiency required, which could not be prepared? Accordingly, the answer to Question 3 as presented, is in the negative.

IV

The answer to Question 4 is in the negative. This is supported by the decision of the court below. It ignored the Government's contention that the $225,000 was assessable as a voluntary payment of tax. The answer is also supported by a provision, new in the 1954 Code. Under Section 6213(b)(3) of that Code, any amount so paid can be assessed notwithstanding the provisions of subsection (a) of Section 6213 of which Section 272(a)(1) is the statutory prototype.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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